United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

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76-1588

To be argued by
GARY A. WOODFIELD

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1588

UNITED STATES OF AMERICA,
Appellee,

—against—

WILLIAM R. GALLAGHER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
GARY A. WOODFIELD,
Assistant United States Attorneys
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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UNITED STATES OF AMERICA,

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Preliminary Statement

William Gallagher appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Neaher, *J.*) on December 3, 1976, which convicted him, upon his plea of guilty, to one count of unlawfully possessing a quantity of wearing apparel which had been stolen from interstate commerce (18 U.S.C. § 659). Appellant was given a $1,000 fine and sentenced to two years imprisonment, the first six months to be served in confinement and the balance on probation.

Appellant's guilty plea was entered after his motion to suppress the evidence which was seized from his house and which formed the basis of the three count indictment against him was denied by Judge Neaher following an evidentiary hearing. The Government consented to appellant's appeal to this Court of the district court's

denial of the suppression motion. Appellant is free on bail pending appeal.

On appeal, appellant contends that the district court erred in not suppressing the items seized from his house because 1) the search warrant was improperly executed at night; and 2) the search warrant was executed at a different place than the premises described in the warrant.

Statement of Facts

(1)

On January 28, 1976, at approximately 3:00 A.M., Kenneth Stalone was arrested by agents of the Federal Bureau of Investigation ("FBI") as he was about to enter a two-story residence at 1576 East 98th Street, Brooklyn, New York (A-2, GA 1a).[1] Stalone, who at the time of his arrest was in possession of a box containing stolen women's wearing apparel, admitted to the agents that he was about to deliver these goods to appellant Gallagher at his residence, 1576 East 98th Street, Brooklyn, New York (A 3). Stalone further advised the agents that he had delivered stolen goods to appellant at his residence on many occasions during the past year (A 3).

Armed with this information, FBI agents immediately established a surveillance on appellant's residence (GA 2a). At approximately 6:30 A.M., appel-

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[1] Numbers in parenthesis preceded by "A" refer to exhibits in appellant's appendix; numbers preceded by "GA" refer to the affidavit of Agent Bohnemeier, which comprises appellee's appendix; references preceded by "Tr." are to pages of the transcript of the suppression hearing held before Judge Neaher on June 10, 1976.

lant, upon exiting his house, was approached by Agent Terry Bohnemeier. Appellant advised Agent Bohnemeier that he was, in fact, William Gallagher, that he resided at 1576 East 98th Street, Brooklyn, New York, and that he was on his way to work (GA 2a). Agent Bohnemeier told appellant that Stalone had been arrested that morning in front of appellant's premises and requested permission to search the residence (GA 2a). Appellant denied any knowledge of Stalone or his arrest and refused to consent to a search (GA 2a).

Later that morning at approximately 7:40 A.M., appellant's wife and children were also approached by Agent Bohnemeier as they exited the house (GA 3a). After identifying himself, Agent Bohnemeier questioned Mrs. Gallagher regarding any knowledge she may have had of Stalone (GA 3a). Mrs. Gallagher denied any knowledge of Stalone and advised Bohnemeier that she was taking her children to school and would return home in a short period of time (GA 3a). Bohnemeier replied that the FBI was in the process of obtaining a warrant to search her residence (GA 3a).

At approximately 2:00 P.M., while the surveillance continued, a search warrant was issued by United States Magistrate Vincent A. Catoggio authorizing the search of appellant's residence ". . . for an unknown quantity of merchandise . . .," including ". . . various types of wearing apparel . . ." (A 1-4). The warrant directed that it be executed between the hours of 6:00 A.M. and 10:00 P.M. Upon issuance of the warrant, Agent John Westhoff proceeded to appellant's residence and attempted to execute the warrant (A 5). However, no one responded to the agent's knock at the door. Indeed, during the entire period between the departure of Mrs. Gallagher and approximately 11:15 P.M., the continuing FBI surveillance revealed no activity at 1576 East 98th Street (A. 6, GA 3a).

Appellant returned at approximately 11:15 P.M., and was observed entering the buliding. Agent Westhoff and three other agents then approached appellant and stated that they had a warrant to search his residence, whereupon appellant escorted them inside (A. 6). Appellant was provided a copy of the search warrant and advised his pertinent Constitutional rights (A. 7, 45).

Once inside, the agents proceeded up a flight of stairs, after which a cursory search was conducted in the living room and bedroom area of appellant's residence with negative results (A. 8, 70). Thereafter, the agents went with appellant to the lower level to a locked door located behind the stairs (A. 8). Upon appellant's failure to produce a key, the agents forced the door and commenced to search a recreation room and an attached bathroom within (Tr. 20). This search resulted in the seizure of numerous items, including coats, slacks, shoes, and fur coats, which ultimately were determined to be stolen (Tr. 20, Ex 1). Labels had been removed from some of these garments making any identification impossible (Tr. 65). Subsequently, a more thorough search of the upstairs rooms resulted in the seizure of additional stolen items (Tr. 25, Ex 1).

Upon entering the recreation room ladened with stolen goods (see Ex 2, 3), Agent Westhoff obtained the permission of appellant to use a telephone located in the room (Tr. 23). Although the telephone did not have a number on it, upon request, appellant supplied the number to the agent (Tr. 24). Also, found in one of the stolen fur coats seized from the bathroom on the lower level was a laboratory receipt in the name of appellant's wife (Ex 4, Tr. 26).[2]

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[2] See Point Two *infra*.

(2)

After the hearing conducted before Judge Neaher on June 10, 1976, in which the appellant offered no evidence, the court, in denying appellant's motion to suppress, found that the search warrant properly identified the area to be searched (A. 28). Judge Neaher further found that the agents' inability to execute the search warrant before 10 P.M., thus violating Rule 41(c), Fed. R. Crim. Pr., was satisfactorily excused by the surrounding circumstances, including the agents' reluctance to execute the warrant when no one was home and the fact that the search was conducted almost immediately after appellant's arrival home (A. 26). In considering the two standards announced in *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975), the district court found that the entry and subsequent search was not an "abrasive invasion" necessitating the application of the exclusionary rule (A. 27). The court went on to state (A. 28):

> I am satisfied no invasion of constitutional rights occurred here that I should feel would warrant my overturning the search and in effect penalizing the Government because they stood out there eight hours and didn't break in the house before 10 P.M.

ARGUMENT

POINT I

The District Court Properly Denied The Motion To Suppress.

Appellant contends that the stolen goods recovered from his home should have been suppressed because they were seized at night time in violation of Rule 41(c), Federal Rules of Criminal Procedure. We disagree. We respectfully submit that the district court was correct in

ruling that the failure of the agents to conduct their search until after 10:00 P.M. was not a fact which required suppression of the evidence recovered in the search.

Even accepting the proposition that the exclusionary rule is an effective device for deterring illegal conduct by law enforcement authorities,[3] we believe that the district court properly found that the violation in this case resulting from the failure by agents to comply with the provisions of Rule 41(c) was not of a constitutional magnitude. Thus, the violation did not trigger the application of the exclusionary rule. Moreover, contrary to appellant's claim, Judge Neaher found that the agents acted in good faith. Thus, the application of the rule would serve no deterrent function with respect to their conduct.[4]

As was adduced at the hearing below, appellant's home was under continuous surveillance from the time of the arrest of Kenneth Stalone in front of the building at approximately 3:00 A.M. on January 28, 1976 (GA

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[3] A recent study has concluded that "[A]s a device for deterring illegal searches and seizures by the police, the exclusionary rule is a failure." Oaks, *Studying the Exclusionary Rule in Search And Seizure*, 37 Chi. L. Rev. 665, 755 (1970).

[4] In *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974), the Supreme Court stated:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

2a). During the surveillance, appellant and his wife and children were seen to exit the house early in the morning (GA 2a). Both were confronted by Agent Bohnemeier and questioned concerning their knowledge of Kenneth Stalone (GA 2a). Agent Bohnemeier was told by Mrs. Gallagher that she would be returning home shortly. It was also reasonable for the agents to assume that appellant would be returning at the end of the day after work. Their continuous surveillance revealed that, in fact, one returned until appellant's arrival at 11:15 P.M. (A6). The agents, in possession of the search warrant, attempted to execute it at approximately 3:30 P.M. but no one was home (A5). As soon as appellant arrived home, the agents exhibited the warrant to appellant and commenced the search in his presence (A6).

The agents, aware that the home was unoccupied, had every reason to believe that either appellant or his wife would return prior to 10:00 P.M. Their desire not to execute the search warrant on the unoccupied dwelling unless exigent circumstances existed, for fear of specious accusations of pilferage, damage to the premises, or the planting of contraband by the returning occupant, is based upon sound principles, and is certainly indicative of good faith. See, *United States* v. *Geruato*, 340 F. Supp. 454 (E.D. Pa. 1972), reversed, 474 F.2d 40 (3d Cir.), *cert. denied*, 414 U.S. 846 (1973).

Moreover, the agents' desire to execute the warrant immediately upon appellant's return was justified. Since the agents could reasonably assume that appellant was aware of their efforts to obtain a search warrant for his premises, they had good reason to fear that if appellant was allowed to remain alone in the unsecured house until the next morning he would destroy evidence. Indeed, the legitimacy of this fear was borne out by the fact that when they searched, the agents discovered labels

removed from some of the garments found in the house, thus making any identification virtually impossible (Tr. 65).

It is thus true that the search warrant in this case was not executed until approximately 11:30 P.M., concedly beyond the time limits expressed in the warrant. Further, we are also aware of the seriousness of a nighttime intrusion into a private home. See, *Gooding* v. *United States*, 416 U.S. 430, 462-465 (1974), J. Marshall dissenting. However, we believe that the district court, after considering all the facts and circumstances, properly held that the exclusionary rule should not be applied in this case.

In *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975), Judge Friendly, writing for the panel, reaffirmed this Circuit's previous characterization of the exclusionary rule as "a blunt instrument," conferring an altogether disproportionate reward, not so much in the interest of the defendant, as in that of society at large. *Id.* at 386, quoting *United States* v. *Dunning*, 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970); see also *United States* v. *Ravich*, 421 F.2d 1196, 1201-02 (2d Cir. 1970). Moreover, Judge Friendly cautioned that "courts should be wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude." *United States* v. *Burke*, *supra*, 517 F.2d at 386.

The *Burke* case involved an appeal of the denial of a motion to suppress a shotgun. The warrant under which the gun had been seized had been issued on state forms and had been sworn to by both state and federal officials. The defendant alleged that the procedural requirements for obtaining a federal warrant, Rule 41(c), had been violated in that: (1) the warrant was directed to "Any

Police Officer" rather than to a "civil officer of the United States;" (2) the warrant commanded that the search take place "within a reasonable time" rather than "within a specified time not to a exceed 10 days;" and (3) the warrant was made returnable to the issuing judge rather than to a designated federal magistrate. *United States* v. *Burke*, *supra*, 517 F.2d at 381-382 While this Court agreed that the Rule's provisions had been violated, it declined to hold that the exclusionary rule should be applied, finding that the defendant's rights had not been infringed. *Id.* at 386-387, citing Fed. R. Crim. Pr. 52(a), which directs that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The court found neither deliberate disregard of Rule 41, nor evidence to indicate that, were the Rules provisions known to the issuing judge, he would not have issued the warrant. *Id.*, at 387.

In recognizing the disportionate severity of the remedy of exclusion, Judge Friendly concluded that short of a violation of the Fourth Amendment, a failure to comply with the requirements of Rule 41 should not result in the exclusion of evidence seized "unless (1) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." *Id.* at 386-387.

Here, the district court found that appellant's Fourth Amendment rights had not been violated (A. 28). Further, Judge Neaher considered the criteria formulated by Judge Friendly and found that they had not been breeched by the agents in this case (A. 26). Judge Neaher held that the search warrant was supported by sufficient probable cause (Tr. 76). Thus, the violation

here had no effect on whether a search would be conducted. The district court further found that the search, although occurring after the proscribed time of 10:00 P.M., was not an "abrasive invasion." (A. 27). Since the agents took every reasonable precaution and only executed the warrant when appellant arrived home after continuous surveillance at the house for approximately 18 hours which revealed no activity, appellant can hardly seriously contend that Judge Neaher erred in finding that this action was not abrasive. Further, the agents at all times acted in good faith. Their actions, rather than being deliberate and callous, were taken, for the most part, with the interests and rights of appellant in mind.[5]

Thus, it is clear that the district court, using the standard for applying the exclusionary rule which was enunciated in *Burke*, properly held that the evidence seized should not be suppressed. Very simply, no proper justification has been demonstrated to trigger the drastic remedy of exclusion of the stolen goods found in appellant's home.

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[5] Significantly, had the agents conducted the search in the "daytime," prior to appellant's return, the intrusion would have been far more "abrasive" than it was, because the FBI would have had to force its way into the building.

POINT II

The Search Warrant Sufficiently Particularized The Premises To Be Searched.

Appellant contends that the stolen goods seized by the FBI were taken from an area which was not adequately described in the search warrant. He claims, as he did below, that the rooms on the lower level of his house from which the agents seized the majority of the stolen items constituted a separate apartment from his own, thus, outside the scope of the search warrant.

We submit that the district court properly found this lower level of rooms to be part of appellant's house, and as such, sufficiently particularized in the search warrant as an area to be searched.

On its face, the warrant directed the agents to search "the 1st floor left of a four family, two-story dwelling" at 1576 East 98th Street, Brooklyn, New York (A-1). As is evident by the supporting affidavit, the agents wished to search appellant's apartment in this multiple family dwelling (A-3).

At the hearing held in the district court, evidence was adduced which clearly supported Judge Neaher's findings that appellant's apartment was comprised not only of the rooms located up one flight of stairs, but also the two rooms located off the garage on the ground level. Appellant stipulated that he was, in fact, the owner of the premises located at 1576 East 98th Street, Brooklyn, N.Y. (Tr. 9, 10). The door to the lower two rooms contained no doorbell, posted name, or any other evidence which would indicate that it was a separate apartment (Tr. 20, 21). Moreover, these two rooms, a recreation room and a bathroom, were so ladened with stolen goods that they

were uninhabitable (Tr. 70). Two additional factors were considered by the district court in determining appellant's ownership of these lower rooms: 1) appellant knew the telephone number of the phone located in the recreation room even though it had no visable number; and 2) a laboratory receipt in the name of appellant's wife was found in the pocket of a stolen coat located in the bathroom of this lower level (A. 27-28).

Since the lower rooms were part of appellant's apartment, the warrant authorizing the search of appellant's residence sufficiently particularized the two floors which were searched. *United States* v. *Canestri*, 518 F.2d 269, 273 (2d Cir. 1975); See, *United States* v. *Melancon*, 462 F.2d 82 (5th Cir.), *cert. denied*, 409 U.S. 1038 (1972); *United States* v. *Bynum*, 386 F. Supp. 449 (S.D.N.Y.), Aff'd., 513 F.2d 533 (2d Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
February 28, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN *A.* SCHALL,
GARY A. WOODFIELD,
Assistant United States Attorneys,
Of Counsel.

APPENDIX

Affidavit of Terry Bohnemeier

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

76 Cr. 201

UNITED STATES OF AMERICA

—against—

WILLIAM R. GALLAGHER,

Defendant.

STATE OF NEW YORK)
COUNTY OF KINGS) SS.:

TERRY BOHNEMEIER, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation and am familiar with the facts and circumstances surrounding the events which form the basis of indictment 76 Cr. 201.

2. This affidavit is submitted in opposition to the defendant William R. Gallagher's motion to suppress evidence seized from his premises on January 28, 1976.

3. On January 28, 1976 at approximately 3:00 A.M., Kenneth Stalone was arrested as he was approaching the premises at 1576 East 98th Street, Brooklyn, New York in possession of a box containing women's wearing apparel which was subsequently determined to have been stolen.

4. Kenneth Stalone admitted that he was delivering this box of women's clothing to William Gallagher at

1576 East 98 Street, Brooklyn, New York. Stalone further admitted that he had delivered stolen goods to William Gallagher at his dwelling on numerous other occasions.

5. Commencing at approximately 3:00 A.M. and continuing until approximately 11:30 P.M. on January 28, 1976, continuous surveillance was maintained on the premises at 1576 East 98th Street, Brooklyn, New York by your deponent, fellow Special Agents of the Federal Bureau of Investigation and New York Port Authority Police. This surveillance resulted in the following observations:

A. At approximately 6:30 A.M., an individual later identified as William Gallagher exited the above-stated premises. Gallagher admitted to your deponent that he was, in fact, William Gallagher and that he resided at the first floor left apartment at 1576 East 98th Street, Brooklyn, New York.

Your deponent advised William Gallagher that Kenneth Stalone had been arrested earlier that morning in front of 1576 East 98th Street. Gallagher after being shown a photograph of Stalone, stated that he didn't know him and knew nothing about the incident of earlier that morning.

Your deponent requested, but was refused by William Gallagher, permission to search his residence. Thereafter William Gallagher departed, stating to your deponent that he was going to work.

B. At approximately 7:40 A.M., an individual later determined to be Mrs. William Gallagher, accompanied

by a couple of children, exited the above-described premises and was approached by your deponent. After identifying myself as a Special Agent of the Federal Bureau of Investigation, I asked Mrs. Gallagher if she knew Kenneth Stalone. She stated that she didn't know him and did not recognize the photograph of Stalone shown to her.

Mrs. Gallagher indicated that she was taking the children to school and would return in a short period of time. I advised her that we were in the process of obtaining a search warrant to search her residence. Thereafter, Mrs. Gallagher departed.

C. Continuous surveillance at 1576 East 98th Street, Brooklyn, New York observed no further activity until approximately 11:15 P.M. when William Gallagher arrived and entered his residence.

6. Earlier, the morning of January 28, 1976, Kenneth Stalone was arraigned before U. S. Magistrate Catoggio and realeased on bail. At the time of his arraignment, Stalone was represented by Theodore Rosenberg, Esq. Stalone stated to Special Agent Michael R. Rigolizzo that he did not know Mr. Rosenberg and had made no arrangements to have any attorney present at his arraignment.

7. At approximately 1:34 P.M. a search warrant was signed by U. S. Magistrate Catoggio, authorizing the search of Gallagher's residence. At approximately 3:30 P.M. Special Agent John Westhoff arrived at Gallagher's premises with the search warrant and attempted to execute it. There was no response to the agent's knock on the Gallagher's door.

Affidavit of Terry Bohnemeier

8. At approximately 11:30 P.M., approximately 15 minutes after the arrival of William Gallagher, agents knocked on the Gallagher's door which was answered by William Gallagher and the search warrant was executed on his premises.

9. The search commenced initially on the first floor area of the Gallagher's premises where a number of items were seized. Thereafter, the search continued into the foyer entrance area. William Gallagher, accompanying the agents throughout the search, indicated that the foyer area was part of his apartment but he stated he didn't have a key to open the locked door. The agents entered this area and seized additional items.

10. On February 2, 1976, after a determination had been made that some of the goods seized from William Gallagher's premises had been stolen from shipments traveling in interstate commerce, William Gallagher was arrested and arraigned before a U. S. Magistrate in the Eastern District of New York. At that time Assistant United States Attorney Gary A. Woodfield, who was handling the arraignment received a telephone call from Theodore Rosenberg, Esq., who indicated that he was representing William Gallagher.

TERRY BOHNEMEIER, Special Agent
Federal Bureau of Investigation

Sworn to before me this
7th day of June, 1976.
.....

★ U. S. Government Printing Office 1976— 714—018—061

Joanne Bracco being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 28th day of February 19 77 he served a copy of the within

Brief & appendix for the appellee

by placing the same in a properly postpaid franked envelope addressed to:

Evseroff & Sonenshine

186 Joralemon Street

Brooklyn, N.Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this

28th day of February 19 77

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4613298
Qualified in Queens
Term Expires March 30,

77